

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

September 8, 2006

Robert K. Beste, III, Esquire
Smith Katzenstein & Furlow LLP
800 Delaware Avenue, 7th Floor
P.O. Box 410
Wilmington, DE 19899

Dean A. Campbell, Esquire
108 North Bedford Street
P.O. Box 568
Georgetown, DE 19947

Re: ***Weinfeld v. Sullivan***
C.A. No. 05C-05-027-RFS

Dear Counsel:

In this replevin action, Plaintiff, Robert Weinfeld (“Plaintiff”) seeks to recover personal property from his former wife, Leslie Sullivan (“Defendant”). Defendant moves to dismiss the complaint for failure to comply with the three-year statute of limitations. 10 *Del.C.* § 8106. Plaintiff claims that his personal property was left with Defendant for safekeeping both in her alleged capacity as a bailee, or alternatively, as his lawyer. He claims a superior right of possession to the property than Defendant may enjoy.

After a two-year marriage, the parties were divorced. The decree was entered in Nevada in 1996. Thereafter, Plaintiff resided in Defendant’s Delaware residence in Ocean View for a period of time. In 1999, Plaintiff departed the residence allegedly

leaving the personal property which is the subject matter of this suit.

Thereafter, Plaintiff's son by a former marriage picked up property from the Ocean View home for his father in 2000. In February of 2005, Plaintiff demanded to inspect the premises to regain possession of the property. However, it was occupied by a tenant, and he was not able to enter.

Subsequently, this suit was filed on May 24, 2005. Both parties are nonresidents, Plaintiff living in Georgia and Defendant residing in Florida. A default judgment was entered on September 16, 2005. It was later vacated on December 9, 2005. The Court found that Plaintiff failed to obtain proper service over Defendant under the long-arm statute. Ultimately, service was perfected with the filing of an amended complaint on February 28, 2006.

In the arguments, the parties have referenced testimony developed at a hearing before the default judgment was vacated. Also, Plaintiff has submitted affidavits on the subject. Consequently, the Court will apply summary judgment principles in this decision. Super. Ct. Civ. R.12(b)(6).

In replevin cases, suit must be commenced within three years from the accrual of the action. *Marvel v. Clay*, 1995 WL 465322 (Del. Super., June 15, 1995). Generally, ignorance of a claim will not toll the applicable limitations period. *Mastellone v. Argo Oil Corp.*, 82 A.2d 379, 384 (Del. 1951). An action "accrues" when there is a right to sue, and, generally, the time of the injury or wrongful act is the measuring date. *Dalton v.*

Ford Motor Company, 2002 WL 338081 (Del. Super., Feb. 28, 2002).

Where property is in the care of another, what is the time of the wrongful act? In *Marvel v. Clay*, Marvel's parents delivered his bike to Clay while he was incarcerated. That date started the three year period. Notwithstanding the imprisonment, the taking of the property could have been reasonably determined through the exercise of diligence. There were no circumstances reflecting fraudulent concealment. Marvel's complaint, therefore, was dismissed as the replevin complaint was filed about a month too late.

As *Marvel* recites at p. 2, a bailment exists when there is a "delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions or kept until he claims it." *See Marvel, supra*. Defendant's arguments point to a bailment for the convenience of the parties for an indefinite time. Should that be the case, suit should not be commenced until the custodian of the property either has appropriated it or has refused to return it upon the demand of the owner. *See Mastellone, supra*. In the former instance, the pertinent question would be whether the appropriation could have been reasonably known or was hidden from discovery. *See Marvel, supra*. In the latter case, it is assumed the custodian has been properly safekeeping the property. Unless the terms of the bailment specify the time of demand, a demand should be made within a reasonable time to start the running of

a statute of limitations against a bailor's cause of action. *See* H.B. Chermiside, Jr., Annotation, (*when Statute of Limitations Starts to Run Against Bailor's Action for Recovery, or for Damages for Conversion or Detention, of Property Deposited for an Indefinite Time*), 57 A.L.R.2d 1044(1958).

In this regard, the function of a demand and return is to alert the bailee that further possession of the property would be wrongful. *See Mastellone, supra*. A demand and refusal of return shows conversion as a matter of evidence. *See Mastellone, supra*. However, it is not a prerequisite or a formal element of a Delaware cause of action in replevin although the rule may be different elsewhere. 10 *Del.C.* § 3907; 2 Victor B. Wooley, *Practice in Civil Action* § 1528, at 1037 (1985); 8A Am. Jur.2d *Bailments* § 217 (where demand is an essential prerequisite to action, in the absence of such demand the period of limitations commences to run at the expiration of a reasonable time within which the demand should have been made.)

Here, Plaintiff claims the suit is timely, arguing the statute would run from time of demand in February, 2005. On the other hand, Defendant maintains the action accrued no later than the date in 2000 when property was picked up at the Defendant's home in Ocean View. On the present state of the record, the Court is not in a position to make an informed judgment about how to apply the pertinent legal principles.

As the parties know, summary judgment motions are normally decided after discovery has been completed. Here, the motion to dismiss was filed after service was

perfected, and there has been no discovery and no substantial record upon which to make a judgment. The affidavits are not thorough, and the hearing last December on the procedural defect was necessarily limited. Summary judgment is not appropriate where a more thorough examination is necessary to clarify how the law should be applied to the particular circumstances. *Ebersole v. Lowengrub*, 180 A.2d 467, 468-9 (Del. 1962).

Consequently, I am ordering that the parties engage in discovery to develop a sufficient record. Discovery should be completed by February 16, 2007. At that time, Defendant shall re-file a summary judgment motion if desired. The parties shall confer to enter and present for approval a stipulated summary judgment briefing schedule on February 16, 2007.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

Original to Prothonotary